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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CAROLINE URSO,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

CASE NO. 3:06-md-1770 MHP

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT ON WELLS' EXEMPTION
CLAIMS UNDER THE:
1) FEDERAL AND CALIFORNIA
OUTSIDE SALES EXEMPTIONS;
2) FEDERAL AND CALIFORNIA
ADMINISTRATIVE EXEMPTIONS; AND
3) CALIFORNIA COMMISSIONED
SALES EXEMPTION**

Date: October 25, 2010

Time: 2:00 p.m.

Ctrm: 15

Honorable Marilyn Hall Patel

1 TO DEFENDANT AND ITS COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that at 2:00 p.m. on October 25, 2010, or as soon thereafter as
3 the matter can be heard in Courtroom 15 of this Court, located at 450 Golden Gate Avenue in San
4 Francisco, California, 94102, Plaintiff Caroline Urso will, and hereby does, move this Court for
5 summary judgment.
6

7 The Plaintiff seeks this Court to grant summary judgment as to Wells' affirmative defenses
8 of exemption under the federal and California outside sales exemptions, the federal and California
9 administrative exemptions, and the California commissioned sales exemption.

10 This motion is based on this Notice of Motion, the accompanying Memorandum of Points
11 and Authorities in support thereof, the Declaration of Kelly McNerney, including the exhibits
12 attached thereto, the pleadings and papers on file herein, and upon such other matters as may be
13 presented to the Court at the time of the hearing.
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I.
INTRODUCTION

Plaintiff Caroline Urso worked for Defendant Wells Fargo as a Home Mortgage Consultant (HMC) from July 2004 to August 2005 in Wells' builder division. She was paid commissions for selling mortgages to the buyers of condos and houses in builder developments. Plaintiff moves for summary judgment on Defendant's affirmative defenses that Plaintiff was an outside salesperson under both federal and California law, that she was administratively exempt under both federal and California law, and that she was a commissioned salesperson under California law.¹

Central to the disposition of both the outside sales exemption and the administrative exemption is what Urso's primary duty was (or how she was "primarily engaged" for purposes of California law).² Wells has asserted that Urso had two primary duties: selling mortgages and providing financial advice.³ However, it is impossible for an employee to have more than one primary duty.⁴ Moreover, Urso could not be exempt as both an outside sales person and be

¹ The California outside sales and commissioned sales provisions are not "exemptions" under the Wage Orders. The former is an exclusion from the Wage Orders and the latter is an exclusion from the coverage of Subsections 3A-3C of the Wage Orders (which include overtime). However, they are often denominated as exemptions. Plaintiff will, for the sake of convenience, sometimes use the term "exemption" in this brief, but the distinction is important because it prevents tacking outside sales and the administrative exemption under California law (see Section VII).

² Under federal law, primary duty is defined in 29 C.F.R. §541.700 as "the principal, main, major or most important duty that the employee performs." Under California law, "primarily" is defined quantitatively and means more than 50% of the work time. Wage Order 4-2001 (Exhibit A), Section 2 (Definitions), Subpart N states "Primarily," as used in Section 1 (Applicability), means more than one-half the employee's work time.

³ Ex B, Deposition of Todd Hauer, (Wells' FRCP 30(b)(6) deponent on Urso's primary duty) 153:3-13; 154:19-23 [HMCs like Urso in 2004 and 2005 had a primary duty of consulting and a primary duty of sales]; Ex. C, Blackwell Depo, 135:12-15 ["sales is a primary function, but so is counseling a borrower to make the right choice."]; Exhibit D, Wells' Supplemental Responses to RFAs Nos. 17-18.

⁴ 29 C.F.R. §541.700 says "duty," not "duties." And by definition, the main or most important duty is singular. This determination is even easier under California law because "primarily" means more than 50% of the working hours so it is mathematically impossible to be primarily engaged in two duties, since it would total more than 100%.

1 administratively exempt at the same time because outside sales people are required to be primarily
2 selling whereas the administrative exemption treats sales work as non-exempt.

3 II. 4 THE BURDEN ON WELLS AT SUMMARY JUDGMENT

5 An employee is entitled to overtime unless the employer can demonstrate that one or more
6 exemptions apply. Labor Code §1194; 8 C.C.R. §§11010-11015. “California law governing
7 wages is remedial in nature and must be liberally construed.” *Bureerong v. Uvawas*, 922 F.Supp.
8 1450, 1469 (C.D. Cal. 1996). “The wage statutes ‘are not construed within narrow limits of the
9 letter of the law, but rather are to be given liberal effect to promote the general object sought to be
10 accomplished.’” *Id* at 1469-1470. As stated by the California Supreme Court:

11 “past decisions...teach that in light of the remedial nature of the legislative
12 enactments authorizing the regulation of wages, hours and working
13 conditions for the protection and benefit of employees, the statutory
14 provisions are to be liberally construed with an eye to promoting such
15 protection. [citation omitted] Thus, under California law, exemptions
16 from statutory mandatory overtime provisions are narrowly construed.
17 [citations omitted] Moreover, the assertion of an exemption from the
18 overtime laws is considered to be an affirmative defense, and therefore the
19 employer bears the burden of proving the employee’s exemption.”

20 *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-795. Federal law regarding
21 wages is similar. FLSA exemptions are to be “narrowly construed against... employers
22 and are to be withheld except as to persons plainly and unmistakably within their terms
23 and spirit.” *Klem v. County of Santa Clara, Calif.*, 208 F.3d 1085, 89 (9th Cir. 2000).

24 Thus it falls to Wells to demonstrate that Caroline Urso was plainly and unmistakably
25 properly classified throughout her employment as exempt. A party like Urso, without the ultimate
26 burden of persuasion at trial, may carry its burden of production at summary judgment either by
27 negating an essential element of the nonmoving party’s defense or by showing that the opposing
28 party does not have enough evidence of an essential element of its defense to carry its ultimate
burden of persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.* (9th Cir. 2000)
210 F3d 1099, 1106; Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial
(Rutter Group Practice Guide) §§14:128-14:131. To demonstrate the lack of any genuine issue of
material fact as to affirmative defenses asserted by the defendant, “plaintiff need not provide any

evidence. It may simply point out the absence of evidence from the defendant.” *Id.* at §14:140, citing to *Fontenot v. Upjohn Co.* (5th Cir. 1986) 780 F.2d 1190, 1195. See also *Celotex Corp. v. Catrett*, (1986) 477 U.S. 317, 323, 325.

III.

IT IS UNDISPUTED THAT PLAINTIFF WORKED OVERTIME

Plaintiff estimates that she worked about sixty hours per week while she was an HMC. Ex. E, Declaration of Caroline Urso ¶11. Defendant has repeatedly admitted that it has no knowledge nor any records of the hours Urso worked. Ex. F, Dixon Depo 58:5-7; 67:23-68:8; Ex. B, Hauer Depo 136:20-137:3; 137:16-138:11.⁵ The only deponent who offered any knowledge of Urso’s hours, Michael Dalzell (her manager for three months) estimates that Urso worked about 50 hours per week. Ex. G, Dalzell Depo 46:13-15. See also Ex. H, Bovensiepe Dec. ¶6. The precise number of overtime hours Urso worked is immaterial for this summary judgment motion. What is relevant is that it is undisputed that she worked in excess of forty hours and was not paid for that overtime.

IV.

IT IS UNDISPUTED THAT URSO’S “PRIMARY DUTY” WAS SALES AND THAT SHE WAS “PRIMARILY ENGAGED” IN SALES

Because Defendant has consistently asserted that Urso was an outside salesperson to this Court and on appeal, Defendant must admit that Urso’s primary duty was sales (federal test) and that she was primarily engaged in sales (California test). As noted, an important distinction between federal and California law is that California has a strictly quantitative test (more than 50% of the employee’s hours).⁶ The March 24, 2010 U.S. Department of Labor’s Administrator’s Interpretation No. 2010-1 states that mortgage loan officers have a primary duty of making sales (Ex. I, pp. 6 [“Indeed, the Administrator is not aware of any court that has found that mortgage

⁵ The U.S. Supreme Court has held that where a company failed to keep records of hours worked, the presentation of evidence by the employees as to their own hours creates a rebuttable presumption that employees worked those hours. *Anderson v. Mt. Clemens Pottery Co.*, (1946) 328 U.S. 680, 687-88. The similar rule in California is found in *Hernandez v. Mendoza*, (1998) 199 Cal.App.3d 721, 726-727.

⁶ *Ramirez, supra*, 20 Cal.4th at 797

1 loan officers – working either inside or outside – have a primary duty other than sales.”] and 9).⁷

2 V.

3 URSO WAS NOT AN OUTSIDE SALESPERSON

4 Both the FLSA and California law require an employee to be selling “away from the
5 employer’s place of business” in order to be considered an outside salesperson.⁸ Wage Order 4-
6 2001, which applies to HMCs like Urso, states, ““Outside salesperson’ means any person, 18 years
7 of age or over, who customarily and regularly works more than half the working time away from
8 the employer’s place of business selling tangible or intangible items or obtaining orders or
9 contracts for products, services, or use of facilities.” (Ex. A, IWC Wage Order 4-2001 (2)(M);
10 codified at 8 C.C.R. §11040(2)(M)). Similarly, the FLSA requires the employee to be customarily
11 and regularly engaged away from the employer’s place or places of business when making sales.⁹

12 Urso was not an outside salesperson because she was not selling away from the employer’s
13 places of business. Rather, the sales work that she did was done at the Temecula branch HMC
14 office, the sales office at the builder site where she was assigned to work, and from her home.
15 These are all the “employer’s places of business.” See, Section V(B). As such, she was not
16 making sales at the customer’s place of business because the customer was the borrower, i.e., the
17 person taking out the loan. See, Section V(C). Rather, the loan application forms (Form 1003s)
18 indicate that 89.5% of the loans for which Urso filled out the Form 1003 were not taken at the
19 customer’s home or the customer’s place of business. See, Section V(E). Moreover, Wells has
20 judicially admitted that it does not know how many hours Urso worked, where she was

21 ⁷ “The Secretary of Labor’s Interpretation of her own regulations is entitled to deference and is
22 controlling unless plainly erroneous or inconsistent with the regulation.” *Klem v. County of Santa*
23 *Clara, Calif.*, 208 F.3d 1085, 1089 (9th Cir. 2000) [emphasis added]; see also *In re Novartis Wage*
and Hour Litigation, 611 F.3d 141, 149, 153 (2nd Cir. 2010).

24 ⁸ The first prong of the test, whether the employee’s “primary duty” was selling (FLSA) or
whether the employee is primarily engaged in sales (California) is undisputed.

25 ⁹ Plaintiff Urso began working for Wells as an HMC in July 2004. At that time, the governing
26 regulation was 29 C.F.R. §541.5. This regulation was amended as of August 23, 2004 and is now
27 found at 29 C.F.R. §541.500. Copies of all relevant regulations are set forth in Exhibit J. The
28 “new” regulation substituted the primary duty test (which had long been contained in the
administrative and executive exemptions) for the 80/20 test but is otherwise the same.

1 geographically when she made sales, or the number of hours that Plaintiff worked on outside sales.
2 See, Section V(A). Thus Wells cannot prove that Urso was an outside salesperson.

3 *Ramirez* holds that to determine whether an employee is an outside salesperson, the court
4 should consider, first and foremost, how the employee actually spends his or her time. *Id.* at 802.
5 But the trial court should also consider whether the employee's practice diverges from the
6 employer's realistic expectations, whether there was any concrete expression of employer
7 displeasure over an employee's substandard performance, and whether these expressions were
8 themselves realistic given the actual overall requirements of the job. *Id.* It is undisputed in this
9 case that Plaintiff spent the vast majority of her time working from either the HMC branch office,
10 the builder site where she was assigned to work, or her home. All of these locations are the
11 employer's places of business (see Section V(B) below), and thus she did not work more than 50%
12 of her time selling away from the employer's place of business. With respect to the second
13 consideration urged by *Ramirez*, Wells has admitted it had no expectation of how or where HMCs
14 would spend their time (Ex. C, Blackwell Depo, 120:13-16 [There is no requirement by Wells that
15 an HMC spend a set amount of time out of the office] and Ex. F, Dixon Depo, 42:17-22 [same]
16 and 38:11-18 ["Provided they achieve modest minimum loan origination, they can spend ... as
17 little or as much of their time in the office as they choose."] Wells did not provide any
18 instructions or directions to Urso that she had to be regularly and customarily contacting
19 customers away from Wells locations (Ex. F, Dixon Depo 74:18-23). In fact, Blackwell and
20 Dixon admitted that "it's consistent with Wells Fargo policy, if in his or her discretion, an HMC
21 could successfully sell spending 80 to 90 percent of their time in the office." Ex. C, Blackwell
22 Depo, 127:9-18; Ex. F, Dixon Depo, 43:11-20. James Dixon, Well's 30(b)(6) deponent on the
23 issue of any dissatisfaction Wells ever displayed at the way Urso performed her job as an HMC,
24 stated that he was unaware "of any dissatisfaction with Caroline Urso." Ex. F, Dixon Depo, 78:5-
9.

25 **A. Wells Has Judicially Admitted That It Cannot Prove Plaintiff Was An Outside**
26 **Salesperson**

27 Wells has admitted, repeatedly, through multiple FRCP 30(b)(6) deponents, that it cannot
28 prove that Urso spent over 50% of her working hours away from the employer's place of business.

1 First is the fact that Wells has repeatedly admitted that it does not know how many hours Urso
 2 was working. Ex. F, Dixon Depo 58:5-7; 67:23-68:8 [Wells has no information regarding how
 3 many hours Urso worked as an HMC]; Ex. B, Hauer Depo 136:20-137:3 [Wells did not know
 4 how many hours Plaintiff Urso was working in either 2004 or 2005]; 137:16-138:11 [no
 5 documents indicate how many hours Urso was worked]. Dixon confirmed that “since Wells
 6 doesn’t know how many hours [Urso] was working, Wells doesn’t know how she was spending
 7 the majority of her time.” Ex. F, Dixon Depo. 58:17-21. Likewise, Brad Blackwell testified,
 8 “Wells Fargo does not oversee the movements of our home mortgage consultants inside or outside
 9 the office. Ex. C, Blackwell Depo, 119:10-15. When James Dixon was asked if this statement of
 10 Blackwell’s was accurate with respect to Urso, Dixon responded, “Yes.” Ex. F, Dixon Depo 41:9-
 11 18).

12 Blackwell made numerous other admissions relevant to Wells’ inability to prove that
 13 Plaintiff was exempt as an outside salesperson:

14 ·HMCs do not sign in and out of their respective office locations (119:22-24);

15 ·HMCs are not required to give the branch manager an itinerary of where they are going
 16 when they are out of the office (119:25 – 120:3);

17 ·Branch managers are not supposed to be kept informed as to an HMC’s comings and
 18 goings during the business day or business week (120:9-12); and

19 ·Wells does not manage the comings and goings of their HMCs (127:3-8).

20 James Dixon confirmed that each and every one of these statements made by Blackwell
 21 was true with respect to Urso in particular. Ex. F, Dixon Depo, 41:19-43:20. He also confirmed
 22 the statement in Blackwell’s declaration that “Although WFHM provides some training, HMCs
 23 are not supervised or monitored with respect to how they spend their time or where they spend
 24 their time” was true with respect to Caroline Urso (37:21-38:10). Further deposition testimony
 25 from Dixon is instructive:

26 ·Wells does not know whether the Plaintiff ever traveled away from Wells locations to
 27 engage prospective borrowers (56:22-57:1);

28 ·Wells does not have any information about where Urso was physically when she solicited
 customers (36:18-20);

1 ·He is unaware of any documents that Wells has which would reflect where Caroline Urso
2 was physically (geographically) during her days as an HMC (43:21-25);

3 ·Neither manager one-on-ones, commission reports, pipeline reports, bringing back
4 business cards from a project, the Relationship Management Tool (RMT), the document
5 prep lists, the 1003 Forms, nor the document entitled "Other Earnings" actually reflect
6 where Urso was geographically when she interacted with a customer, solicited a loan, or
7 originated a home loan (51:6-16; 52:2-54:8; 81:8-12; 86:16-23; 87:24-88:7);

8 · Wells does not know the approximate number of hours that Plaintiff worked on outside
9 sales solicitations (68:9-11);

10 · Wells does not know the approximate number of hours that Plaintiff worked on work
11 incidental to outside sales (68:12-16);

12 ·Wells does not know the approximate number of hours worked by Urso on inside sales
13 (69:1-3); and

14 · Wells did not provide any instructions or directions to Urso that she had to be regularly
15 and customarily away from Wells locations when contacting customers (74:18-23).¹⁰

16 These judicial admissions of Blackwell, Dixon, and Hauer are of enormous consequence.
17 Wells has admitted repeatedly, under oath, that, in effect, it can never prove its affirmative
18 defenses because it doesn't know how or where Plaintiff Urso was primarily engaged or how
19 many hours she actually worked.¹¹ Plaintiff has thus satisfied her burden of production at
20 summary judgment by showing that Wells does not have enough evidence of an essential element

21 ¹⁰ The deposition of Todd Hauer, another of Wells' 30(b)(6) deponents, also demonstrates that
22 Wells cannot possibly prove that Urso was properly classified as an outside salesperson. Hauer
23 testified that Wells did not know how many hours Plaintiff Urso was working in either 2004 or
24 2005. (Ex. B, 136:20-137:3). Furthermore, he testified that although he had seen all of the
25 documents pertinent to Urso, none of the documents he reviewed reflected that Caroline Urso was
26 spending the majority of her working time engaged in outside sales. (139:19-25).

27 ¹¹ Wells may argue that this testimony is consistent with the "nature" of the outside salesperson.
28 While it may be true that even today outside salespeople may not be strictly supervised with
respect to the specific moments or locations of outside sales solicitations, this does not excuse
Defendant from having to prove its affirmative defense that Urso was properly classified. FLSA
exemptions are to be "**narrowly** construed against... employers and are to be withheld except as
to persons **plainly and unmistakably** within their **terms** and spirit." *Klem v. County of Santa*
Clara, Calif., 208 F.3d 1085, 89 (9th Cir. 2000) [emphasis added].

1 of its defense to carry its ultimate burden of persuasion at trial.¹²

2 **B. Wells' "Places of Business"**

3 As stated previously, outside salespeople must be making sales "away from the employer's
4 place of business." *Ramirez, supra*, 20 Cal.4th at 797. Accordingly, one must consider what
5 constitutes an "employer's place of business." Urso worked at the Wells HMC branch office in
6 Temecula, the sales office at a builder site where she was assigned, and from home. Ex. E,
7 Declaration of Caroline Urso, ¶6, 13.¹³ 29 C.F.R. §541.502 gives an expansive definition of "the
8 employer's place of business:"

9 **29 C.F.R. §541.502 Away from employer's place of business**

10 An outside sales employee must be customarily and regularly engaged "away
11 from the employer's place or places of business." The outside sales employee is
12 an employee who makes sales at the customer's place of business or, if selling
13 door-to-door, at the customer's home. Outside sales does not include sales made
14 by mail, telephone or the Internet unless such contact is used merely as an adjunct
15 to personal calls. Thus, any fixed site, whether home or office, used by a
16 salesperson as a headquarters or for telephonic solicitation of sales is considered
17 one of the employer's places of business, even though the employer is not in any
18 formal sense the owner or tenant of the property... [emphasis added]¹⁴

15 ¹² *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.* (9th Cir. 2000) 210 F3d 1099, 1106;
16 Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* (Rutter Group Practice
17 Guide) §§14:128-14:131. To demonstrate the lack of any genuine issue of material fact as to
18 affirmative defenses asserted by the defendant, "plaintiff need not provide any evidence. It may
19 simply point out the absence of evidence from the defendant." *Id.* at §14:140, citing to *Fontenot v.*
20 *Upjohn Co.* (5th Cir. 1986) 780 F.2d 1190, 1195.

21 ¹³ Plaintiff Urso states that she was assigned by Wells to the Lakeshore Villas sales office of the
22 condo conversion in Oceanside, California and spent Saturdays and Sundays and sometimes one
23 day during the week there (Ex. E, ¶6). See also Ex. K, Urso Depo. 46:18-47:7; 84:4-18.

24 ¹⁴ To the extent that California law is patterned after federal statutes and regulations, the Court can
25 look to federal authorities as an aid in their interpretation. *Bell v. Farmers Insurance Exchange*,
26 (2001) 87 Cal.App.4th 805, 814-815. Note, however, that there are two extremely important
27 distinctions between federal law and California law with respect to outside salespeople. *Ramirez,*
28 *supra*, 20 Cal.4th at 797. California law uses a strict quantitative approach for "primarily engaged"
as opposed to the FLSA's qualitative approach to determine primary duty. Second, California law
(unlike federal law) "does not contain any provision that reclassifies intrinsically nonexempt sales
work as exempt based on the fact that it is incidental to sales. The language of the state exemption
only encompasses work directly involved in 'selling ... items or obtaining orders or contracts.'" *Id.*
As such, the California Supreme Court recognized that California state law provides **greater**
protection to employees than the federal law. *Ramirez, supra*, 20 Cal.4th at 795, 797-798.

1 The Wells branch office is obviously “an employer’s place of business.” Home
 2 offices are likewise considered “an employer’s place of business.” *Chao v. First National*
 3 *Lending Corp.* (N.D. Ohio 2006) 516 F.Supp.2d 895, 901 [loan officers were not customarily
 4 and regularly engaged away from defendant’s place of business because they most of their
 5 work was done from the office or from their own homes]. See also the language of the
 6 regulation which states “any fixed site, whether **home** or office.” If a home office (i.e., an
 7 office in an employee’s own home) can be considered an “employer’s place of business,”
 8 then certainly a sales office that Wells ordered its employees to staff is likewise an
 9 employer’s place of business. Note, the regulation specifically states that any fixed site used
 10 as a headquarters is an employer’s place of business “even though the employer is not in any
 11 formal sense the owner or tenant of the property.” This is consistent with how a home office,
 12 which is not owned or controlled by an employer, can still be considered an “employer’s
 13 place of business.” In fact, Plaintiff was required to be at the builder site on weekends and
 14 sometimes during the week and used it as her office for following up on sales. Ex. E, Urso
 Dec. ¶6; Ex. G, Dalzell Depo 34:9-13.

15 California law takes an equally expansive definition of what constitutes an employer’s
 16 place of business. California’s Division of Labor Standards Enforcement (the DLSE) issued an
 17 Opinion Letter on September 8, 1998 regarding “the employer’s place of business.”¹⁵ It states:

18 “The employer’s place of business” is not limited, by the IWC definition, to a
 19 principal place of business or an administrative headquarters. In the
 20 construction of remedial wage and hour regulations, any exemption is to be
 construed narrowly, and is limited to those employees who fall plainly and
 unmistakably within its terms. [citations omitted].

21 We therefore conclude that temporary trailers and model homes located at a
 22 tract housing site, although physically separate from the home builder’s or
 23 seller’s headquarters office, nonetheless constitute “the employer’s place of

24 ¹⁵ DLSE Opinion Letters, while not controlling upon the courts by reason of their authority, do
 25 constitute a body of experience and informed judgment to which courts and litigants may properly
 26 resort for guidance. *Bell, supra*, 87 Cal.App.4th at 815, citing to *Morillion v. Royal Packing Co.*,
 (2000) 22 Cal.4th 575, 584. See also DOL Opinion Letter of January 25, 2007, 2007 WL 506574,
 27 *4 which held that “the sales offices is the employer’s place of business, because it is a fixed site
 used as a ‘headquarters’ for making sales.” (Ex. AA).

business” within the meaning of the IWC’s definition of “outside salespersons.”

Even more importantly, the DLSE states, “Time spent performing any work at the employer’s place of business, even if it [is] sales work, counts against the exemption.”

(Pages 1-2). (Ex. L, DLSE Opinion Letter dated September 8, 1998).

C. The “Customer” Is The Borrower Obtaining The Mortgage, Not A Builder Or Any Other Referral Source

Outside salespeople are those employees “who make[] sales at the customer’s place of business or, if selling door-to-door, at the customer’s home.” 29 C.F.R. §541.502; see also *Ramirez, supra*, 20 Cal.4th at 795 and *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 486-487 (E.D. Cal. 2006). Wells has now come up with a post-litigation fabrication of who its “customers” are. Wells has asserted that “customers” are not only the borrowers who take out mortgages, but also the builders, developers, realtors, bankers, attorneys, CPAs, and other HMCs! (Ex. B, Hauer Depo 118:20-23; Ex. M, Wells’ Supplemental Responses to Plaintiff’s Interrogatories (Set One) No. 10.

However, all evidence is that the customer is the borrower, i.e., the individual taking out the mortgage. James Dixon (Wells’ FRCP30(b)(6) designate on who were “customers” under the FLSA) ultimately admitted that “customers” refers to borrowers and the term “clients” refers to sources other than “borrowers.” (Ex. F, 30:6-11). Specifically, he admitted that builders are viewed by Wells as clients or referral sources and not as customers (Ex. F, 30:18-22; 32:23-25; 34:5-8). He finally stated that Wells considers “customers” to be people who are taking out home loans (34:9-12). See also Exhibits N, O, and P. Wells’ recent assertion that everybody is a customer is also contrary to the testimony of Brad Blackwell who testified in 2006 as a 30(b)(6) deponent, “Customers are the ones that actually fund loans with Wells Fargo.” (Ex. C, 181:21-22).¹⁶

¹⁶ Wells’ attempt to make referral sources “customers” in order to qualify for the outside sales exemption is also belied by its whole compensation scheme. Brad Blackwell confirmed that HMCs do not get paid unless the “customer” buys a loan or gets a loan and it closes (Ex. C, 167:6-14]; Wells Fargo Home Mortgage receives no compensation from builders or realtors (170:14-21); Wells Fargo Home Mortgage sells no loans to builders or realtors (in their capacity as builders or (footnote continued)

Wells cannot dispute that Urso did not travel to her “customer’s place of business.” In fact, Urso states that she “never left the HMC branch office or Lakeshore Villas to try to seek out prospective borrowers,” she “rarely went out into the field,” and “almost always asked the customer to come to the sales office at the condos or the Temecula office or to just send in what was needed.” Ex. E, Urso Dec. ¶¶7, 8. Moreover, Wells has admitted it has does not know: whether the Plaintiff ever traveled away from Wells locations to engage prospective borrowers (Ex. F, Dixon Depo. 56:22-57:1); it does not have any information about where Urso was physically when she solicited customers (36:18-20); and there are no documents which reflect where Caroline Urso was physically (geographically) during the times she was selling home mortgages (43:21-25). The one relevant document that does exist, the Form 1003, supports Plaintiff’s position that she was not at the customer’s home or place of business when she sold mortgages. See Section V(E) Other than the two, sometimes three, days a week when Urso was assigned to work at the Lakeshore Villas sales office (one of Wells’ places of business), she spent the vast majority of time working at the HMC Temecula branch, or, to a lesser extent, her home. She had information regarding interested customers faxed to her from the sales agents at the builder sites when she was not on site and she did the loan processing at the branch office or her home. Ex. E, Urso Dec. ¶¶6-8, 13.

D. The Pharmaceutical Cases Do Not Support Defendant’s Case

Defendant may try to draw some parallel between Urso, as a seller of mortgages, to California pharmaceutical sales representatives (PSR) cases, in which sales reps for pharmaceutical companies “market” drugs to physicians in order to convince physicians to prescribe those drugs to their patients. However, these cases are neither analogous nor authoritative. It is against the law for pharmaceutical representatives to sell directly to patients. This alone distinguishes these cases because Urso actually marketed and sold the mortgages directly to the consumer (i.e., the borrower).

 realtors) (170:22-171:4); HMCs receive no compensation on a loan that doesn’t fund (175:3-9); and Wells Fargo doesn’t charge builders or realtors for any services HMCs provide to them (177:1-6). Furthermore, he admitted that what Wells Fargo ultimately wants from builders and realtors is referrals of “customers” who will close loans (179:21-180:16).

1 More importantly, the future of these trial court decisions will be impacted by the recent *In*
 2 *re Novartis* opinion (July 2010), which is the only appellate court to issue an opinion on the
 3 subject. *In re Novartis*, 611 F.3d 141 (2nd Cir. 2010). It held that the pharmaceutical sales
 4 representatives are not exempt as outside salespeople and are not administratively exempt. *Id.* at
 5 154-55, 156-157. Although a case from the Second Circuit, *In re Novartis* includes claims under
 6 California state law and the court concluded that “the district court’s rulings that the Reps fall
 7 within the exemptions provided by state law” be vacated. *Id.* at 157. The court in *In re Novartis*
 8 resolved the issue of “commitments to buy” specifically:

9 “It [defendant] argues that the Reps “make sales in some sense” because “they
 10 are responsible for eliciting commitments from the physicians on whom they
 11 call to write prescriptions for NPC drugs and that these prescriptions are, in
 12 essence, orders for NPC drugs to be used by the patients in purchasing the drugs
 13 from pharmacies. [citations omitted] Novartis’s emphatic reliance on the word
 14 “commitments,” however, does not lead to a conclusion that the Reps make
 15 sales, for it ignores the nature of the “commitment” expressly envisioned by the
 16 Secretary in enacting the regulations: “a commitment to buy.” [citation omitted]
 17 The type of “commitment” the Reps seek and sometimes receive from
 18 physicians is not a commitment “to buy” and is not even a binding commitment
 19 to prescribe.” *Id.* at 154[emphasis in the original]

20 This is important because HMCs like Urso did not obtain “commitments to buy” from
 21 referral sources like builders. The builder did not “buy” anything from Wells Fargo. Moreover,
 22 HMCs could, and indeed did, market directly to the “end-users,” i.e., the customers/borrowers.
 23 The fact that Wells had a relationship with a particular builder did not mean that purchasers of
 24 homes constructed by that builder could only obtain their mortgages with Wells Fargo. In fact,
 25 Wells states that it was not the exclusive lender at either Lakeshore Villas or CNH. Ex. G, Dalzell
 26 Depo 36:7-18 and 37:23-38:4. A buyer was always free to obtain a mortgage from any lender he
 27 or she chose and Wells has never produced any evidence to the contrary.¹⁷

28 ¹⁷ Thus, even analogizing doctors to realtors or builders would fail because the doctor decides
 what to prescribe and the patient is bound. [“However, physicians here, like the physicians in
 25 *Medtronic*, directly control which and how much, of any medication is purchased by patients.
 26 Physicians, not the end-users, select the appropriate medication. In the chain of pharmaceutical
 27 sales, the physicians are the decision makers.” *Yacoubian v. Ortho-McNeil Pharmaceutical, Inc.*,
 2009 WL 3326632 *5 (C.D. Cal. 2009)]. The same certainly is not true in our case. The home
 buyer is hardly bound by a recommendation from a broker or builder.

1 **E. Form 1003**

2 According to Wells' FRCP 30(b)(6) deponent, Brad Blackwell, who is the Vice President
 3 and National Sales Manager for the Home & Consumer Lending Division, the "point of sale"
 4 occurs when the loan application is taken. Ex. C, 193:24-25["...a loan is sold when the borrower
 5 commits to filling out an application and going through the credit and underwriting process."] (*Id.*
 6 at 173:16-20). That loan application form is called a Form 1003. A copy of this federally
 7 mandated form is attached as Exhibit Q. While the form itself consists of multiple pages, there is
 8 only one section that needs to be reviewed. It is at the end and is important because it actually
 9 mirrors 29 C.F.R. §541.502, which states that outside sales do "not include sales made by mail,
 10 telephone or the Internet unless such contact is used merely as an adjunct to personal calls." On
 11 the Form 1003, there are four blocks that the HMC must choose from when signing off on the
 12 application. Those four blocks give the HMC a choice to indicate whether the application was
 13 taken by face-to-face interview, mail, telephone, or internet. Wells produced a summary of all of
 14 Caroline Urso's 1003 forms (Ex. R). Of the eighty-six (86) loans for which Urso filled out the
 15 1003 form, she checked "mail" 65 times, "telephone" 12 times, and left the section blank 9 times.
 16 In other words, Caroline Urso checked mail or telephone 89.5% of the time. This is
 17 incontrovertible evidence that 89.5% of her loans were not taken at the customer's home or the
 18 customer's place of business.¹⁸ Even if a few of the ones left blank were taken "face to face" it
 19 does not mean they were necessarily outside loans; they could have been completed in one of her
 20 "offices," i.e., in one of the employer's places of business. See Ex. K, Urso Depo. p. 62:12-16; p.
 21 63:1-11 [she typically did not meet with the buyers during the process from prequalifying to the
 22 loan being funded; the only time she met with customers was when she was on-site at the
 23

24 ¹⁸ Wells Fargo's FRCP 30(b)(6) designate on this issue, James Dixon, stated that he believes the
 25 Form 1003s completed by the HMCs have been accurate with respect to this section dealing with
 26 how the loan application was taken, for example, in person, by phone, etc. He further confirmed
 27 that Wells Fargo trains its HMCs that it is important to complete all parts of the 1003 accurately.
 28 (Ex. D, 78:10-79:5.) Michael Dalzell, one of Urso's managers, pointed to the 1003 in his
 deposition as a means of determining whether the customer and the HMC were physically together
 ("face to face") at the time of the 1003 completion. (Ex. G, Dalzell Depo. 42:1-16.)

development and those were only a few instances].¹⁹

F. Wells Misconstrues What Constitutes "Outside Sales"

Wells has twisted the concept of outside sales so far from reality that Wells simply considers everything its HMCs do to be "outside sales." For example, James Dixon testified that Wells does not differentiate between outside sales and inside sales. Specifically, he stated, "Everything is an outside sale within our – my world, our division, you know, retail mortgage lending. It's outside sales for us." Ex. F, 55:14-19; see also 69:10-70:16. Likewise, Todd Hauer stated that Wells only utilized the term "inside sales" to refer to "sales being done in the call centers." Ex. B, 127:23-128:2. (Wells has a group of HMCs at two national call centers who are classified as non-exempt; all HMCs like Urso who work outside the call centers are known as "distributed HMCs.") Apparently, Wells does not believe any sales by a distributed HMC are inside sales. When Hauer in deposition was recently presented with a "scenario where a prospective borrower calls an HMC in a Wells location, talks to that HMC about a loan, does the loan application over the phone, and let's say mails in all of the necessary supporting documents to the HMC at the HMC's Wells office," Hauer responded that Wells would consider that an outside sale because the customer happened to be outside of the branch! Ex. B, 128:11-129:9.

In Wells' perception, all HMC sales are outside sales and no sale made by an HMC has ever been an inside sale, unless that HMC was working in a call center (and classified by Wells as non-exempt).²⁰

Defendant may argue that Urso is an outside salesperson because of the "promotional work" that she did. Wells' basic argument is that, because Urso marketed outside to referral

¹⁹ Defendant has previously criticized Plaintiff's reliance on the Form 1003 to demonstrate that Plaintiff's sales were inside sales. Although the Form 1003 cannot tell where an HMC spends her day, if the place of commitment is relevant, the 1003 shows in Urso's case that it was not occurring at the customer's place of business or home.

²⁰ Ex. B, Hauer Depo 126:17-127:14; Ex. C, Blackwell Depo 128:22-129:11. Interestingly, there is virtually no difference between what a centralized, non-exempt HMC at one of the call centers does compared to a distributed HMC like Plaintiff Urso. When asked about the difference, Brad Blackwell stated that the only difference was that the distributed HMC is able to meet with customers locally and "can help bring together real estate agents and consumers." Ex. C, Blackwell Depo, p. 83:7-84:22.

sources such as builders, therefore all her sales were “outside.” However, 29 C.F.R. §541.503(a) states, “Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt.”[emphasis added].²¹

VI. THE ADMINISTRATIVE EXEMPTION

A. The Federal Administrative Exemption

That federal administrative exemption is set forth at Section 13(a)(1) of the Fair Labor Standard Act, 29 U.S.C. §213(a)(1). As pointed out earlier, this claim inherently conflicts with Defendant’s outside sales claim. Under the federal outside sales exemption, the primary duty must be sales. Under the administrative exemption, the primary duty cannot be sales. The DOL Administrator’s Interpretation No. 2010-1 is exactly on point; the subject of that interpretation is “Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. §213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer.”²² It concludes that mortgage loan officers who perform the typical duties described “have a primary duty of making sales for their employers and therefore, do not qualify as bona

²¹ Hauer testified that it was Wells’ position that if HMCs were physically outside of Wells locations contacting referral sources (such as builders and realtors) that this was exempt activity under the outside sales exemption. Ex. B, 123:22-124:14. The problem with this is §541.503 makes promotion work exempt only when done to further the salesperson’s own outside sales. A route sales person is an example; if that individual is out on the road selling, promotion work done to further those outside sales is exempt. Promotional work is not exempt if it is done to further an HMC’s inside sales, regardless of where that promotional work is performed. First, one must determine if the salesperson is really engaged in outside sales. If not, any promotional work is furthering non-exempt inside sales. Dixon, when asked, “And as far as Wells is concerned, if you’re spending time with referral sources like brokers, CPAs, builders, financial planners, that’s outside sales. Right?” replied, “Correct.” (Ex. F, Dixon Depo. p. 57:25-58:4). But in reality, even time spent outside with referral sources to further inside sales can never translate to either outside sales or exempt promotion work.

²² “The Secretary of Labor’s Interpretation of her own regulations is entitled to deference and is controlling unless plainly erroneous or inconsistent with the regulation.” *Klem v. County of Santa Clara, Calif.*, 208 F.3d 1085, 1089 (9th Cir. 2000) [emphasis added]; see also *In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 149, 153 (2nd Cir. 2010). Although this Interpretations applies to inside mortgage loan officers, Plaintiff contends she was an inside loan officer.

1 fide administrative employees.” (Ex. I, p. 9)²³

2 29 C.F.R. §541.200 requires the employee to be compensated on a salary or fee basis at a
3 rate of not less than \$455 per week; to have a primary duty of the performance of office or non-
4 manual work directly related to the management or general business operations of the employer or
5 the employer’s customers; and whose primary duty includes the exercise of discretion and
6 independent judgment with respect to matters of significance.

7 Wells cannot prove that Urso performed work “directly related to management or general
8 business operations.” 29 C.F.R. §541.201 states, in part, that an employee “must perform work
9 directly related to assisting with the running or servicing of the business, as distinguished, for
10 example, from working on a manufacturing production line or selling a product in a retail or
11 service establishment.” This sets up the production worker dichotomy.²⁴ The DOL

12
13 ²³ The DOL’s Administrator’s Interpretation No. 2010-1 negates Wells Fargo’s contention that
14 Plaintiff’s primary duty was also providing financial advice. It points out that compiling and
15 analyzing potential customers’ financial data is done by loan officers because “doing so is
16 necessary to evaluate the customers’ qualifications for a loan, i.e., to make a sale” citing to *Pontius*
17 *v. Delta Financial Corp.*, 2007 WL 1496692, at *9 and n.20. “They are not analyzing the
18 information to provide advice to the customer, which the customer could take and use elsewhere.
19 Rather the loan officers are performing ‘screening’ for the benefit of the employer, rather than
20 servicing for the benefit of the customer.” (Ex. I, Administrator’s Interpretation No. 2010-1 at p.
21 5).

22 ²⁴ *Martin v. Cooper Electrical Supply Co.*, 940 F.2d 896, 905 (3rd Cir. 1991)[inside salespersons
23 who sold electrical products for their employer did not “service” the business simply because they
24 engaged in negotiations and represented the employer in their sales efforts, because such
25 negotiations over the price and other terms of the sale “are ‘part and parcel’ of the activity of
26 ‘producing sales’.” *Id.* at 904. Accordingly, any such duties undertaken “in the course of ordinary
27 selling do not constitute administrative-type servicing of Cooper’s wholesale business ... These
28 activities are only routine aspects of sales production.” *Id.* at 905.] See also *Casas v. Conseco*
Finance Corp., 2002 WL 507059, at*9 (D. Minn. March 31, 2002) [2,800 loan originators were
not administratively exempt because they were production workers since their primary duty was to
sell home loans to individual consumers. Specifically, the court stated:

25 “After careful consideration, the Court concludes that plaintiffs are production rather than
26 administrative employees. Conseco’s primary business purpose is to design, create and
27 sell home lending products. As loan originators making direct contact with customers, it is
28 plaintiffs’ primary duty to sell these lending products on a day-to-day basis. As is evident
from a description of plaintiff’s job duties, plaintiffs are responsible for soliciting, selling
and processing loans as well as identifying, modifying and structuring the loan to fit a
(footnote continued)

1 Administrator's Interpretation 2010-1 found loan officers similar to Urso to be production
 2 workers. (Ex. I, pp 3-6 ["mortgage loan officers perform the production work of their employers"]).
 3 Likewise, Urso was not administratively exempt because she was a production worker.

4 Wells cannot prove that Urso exercised discretion and independent judgment since she
 5 simply exercised skill, she could not change loan requirements, and the underwriters made the
 6 ultimate decisions to approve the loans. 29 C.F.R. §541.202 describes "discretion and
 7 independent judgment."²⁵

8 Moreover, Urso was not administratively exempt because she sold financial products.

9 customer's financial needs. In the Court's view, these duties establish that plaintiffs are
 10 primarily involved with "the day-to-day carrying out of the business" rather than the
 11 "running of [the] business [itself]" or determining its overall course or policies."
 12 See also *Wong v. HSBC Mortgage Corp.*, 2008 WL 753889, at *7 (N.D. Cal. 2008) [summary
 13 judgment granted because plaintiff mortgage loan officers were not administratively exempt];
 14 *Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *8 [loan officers' primary duty was to
 15 generate sales, rather than assisting in the administrative operations]; *Davis v. J.P. Morgan Chase
 & Co.*, 587 F.3d 529, 535 (2nd Cir. 2009), cert denied 130 S.Ct. 2416, [underwriters were found
 16 not be administratively exempt because they were production workers]

17 Wells' 30(b)(6) witness Brad Blackwell also supports Plaintiff's contention that HMCs are
 18 production workers. Asked the primary product of Wells Fargo Home Mortgage, he answered,
 19 "the primary products are a variety of home loans used for the purpose of purchasing or financing
 20 one- to four-unit residential real estate properties." Ex. C, 169:15-22. When asked what products
 21 the HMC can sell, he answered, "The product that they directly sell is – are mortgages." (168:13-
 22 17). Furthermore, he admitted that if an HMC counsels a customer and that customer's loan
 23 doesn't fund, the HMC receives no compensation for that counseling (175:6-9) and that Wells
 24 doesn't charge customers for counseling (176:23-25).

25 ²⁵ Section (e) of the regulation states, in relevant part, "The exercise of discretion and independent
 26 judgment must be more than the use of skill in applying well-established techniques, procedures or
 27 specific standards described in manuals or other sources." Plaintiff Caroline Urso simply
 28 exercised skill in filling out required forms and inputting information. The computer told her
 which loans were available to a particular customer. Ex. E, Urso Dec. ¶5. It was the underwriters,
 not the HMCs, who actually approved the mortgage loans. Ex. G, Dalzell Depo, 72:1-3; Ex. E,
 Urso Dec. ¶¶5, 15. See *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at*9-10 (D. Minn.
 March 31, 2002) [2,800 loan originators lacked the discretion and independent judgment necessary
 to qualify for the administrative exemption]; *Pontius v. Delta Financial Corp.*, 2007 WL
 1496692, at *10-11 [mortgage analysts do not exercise independent judgment and discretion to
 satisfy administrative exemption] and the DOL Opinion Letter of May 17, 1999 which concluded
 that loan officers of a mortgage brokerage company were not administratively exempt in part
 because their activities required "the use of skill and experience in applying techniques,
 procedures, or specific standards rather than the exercising of discretion and independent
 judgment, within the meaning of the regulations." (Ex. S, p. 2).

29 C.F.R. §541.203(b) states, in relevant part, “**However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.**” [emphasis added]. As such, there is no way for Urso to be administratively exempt under the federal exemption since her primary duty was selling mortgages.

Finally, Defendant cannot prove that Urso met the salary basis test.²⁶

B. The Administrative Exemption Under California Law

The test for administratively exempt employees is set forth at Wage Order 4-2001(1)(A)(2) and Section 1(A)(2) of 8 C.C.R. §11040 and is largely similar to the federal requirements, except that California law again uses a quantitative test, requiring the employee to spend over 50% of his or her working hours performing administrative activities and Section (f) states that “the activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215.” The effective date of this order was January 1, 2001. See Ex. A, Wage Order 4-2001, title page and first page. The significance of this is that California does not use some of the federal regulations that were amended in 2004. A copy of the C.F.R. regulations as of 2001 is attached as Exhibit W, with inapplicable provisions crossed out.²⁷

²⁶ HMCs were paid “minimum recoverable draws against net commissions” which were subject to numerous deductions. Ex. U, 2004 HMC Compensation Plan, p. 1, Section IV(A) [“deficits may result from commission splits, commission draws, overpaid compensation, pricing subsidies or from losses to Wells Fargo Home Mortgage, resulting from uncollected fees, violation of company policies or procedures, or for failure to meet loan compliance and quality requirements, price protection, registration and documentation requirements or other performance expectations set forth herein.”]; Ex. B, Hauer Depo 27:21-28:4, *et seq.* Deductions vitiate “salary.” 29 C.F.R. §541.602(a) [“which amount is not subject to reduction because of variations in the quality or quantity of work performed.”]

²⁷ Unfortunately for Wells, its FRCP 30(b)(6) deponent on the issue of whether Urso was deemed by Wells to be exempt under California law, Todd Hauer, simply stated he did not know. (Ex. B, Hauer Depo, 150:2-17). When asked if there was anything in any of the documents that he reviewed relating to Caroline Urso that indicates that she was providing advice or counseling to prospective borrowers about what financial products were available, Hauer responded, “Not to my knowledge.” Ex. B, 159:20-25. Likewise, James Dixon, in his deposition, when asked the approximate number of hours worked by Urso on identifiable administratively exempt tasks, (footnote continued)

As described earlier, Urso was a production worker, and thus not administratively exempt. See *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 826 [insurance adjusters were production workers because claims adjusting was the sole mission of the branch claims offices where the plaintiffs worked].

Similarly, Wells cannot prove that Urso used independent judgment and discretion. Plaintiff Urso simply exercised skill in filling out required forms and inputting information. The computer told her which loans were available to a particular customer. Ex. E, Urso Dec. ¶5. It was the underwriters, not the HMCs, who actually approved the mortgage loans. Ex. G, Dalzell Depo, 72:1-3; Ex. E, Urso Dec. ¶¶5, 15. Nor can Wells prove that Urso met the salary basis test under California law.

VII.

THE "COMBINATION EXEMPTION" DOES NOT APPLY

A. Wells Cannot Prove That Urso Satisfied The "Combination Exemption" Under Federal Law

Wells may claim that the "combination" exemption applies.²⁸ The combination exemption allows exempt duties under one category to be "tacked" onto exempt duties from another category.²⁹ According to the Secretary of Labor, "the combination exemption addresses the

answered that neither he nor Wells knew. (Ex. F, 70:17-23). Wells cannot prove that Urso was properly classified as exempt under the California administrative exemption, which requires the employee to be primarily engaged in exempt administrative tasks (meaning over 50% of work time) if Wells does not know how many hours were worked by Urso on identifiable administratively exempt tasks.

²⁸ Wells did not plead the combination exemption as an affirmative defense in its Answer (Ex. X, Doc.1, Case No. 05-CV-01175 MHP, ¶3), nor did it identify it as one of the federal or California exemptions applying to Urso in its Supplemental Responses To Plaintiff Urso's Interrogatories, Nos. 1 and 2 (Ex. M).

²⁹ Specifically, 29 C.F.R. §541.708 states :

"Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative work and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section." [See, Ex. BB for pre and post August 2004 regulations]

1 situation when an employee does not meet the primary-duty requirement of any individual
 2 exemption.” *Intracomm, Inc. v. Bajaj*, 492 F.3d 285, 294 (4th Cir. 2007) [emphasis added]. “In
 3 other words, the combination exemption provides a mechanism for cobbling together different
 4 exempt duties for purposes of meeting the primary-duty test.” *Id.* In the instant case, it has clearly
 5 been established that Urso’s primary duty was selling mortgages. As a result, this is not a
 6 “situation when an employee does not meet the primary-duty requirement of any exemption.”
 7 Thus, it is not necessary to “cobbl[e] together different exempt duties for purposes of meeting the
 8 primary-duty test.” Moreover, **selling financial products such as mortgages is specifically non-**
 9 **exempt work under the administrative exemption.** 29 CFR §541.203(b). Thus, tacking the
 10 administrative exemption onto the outside sales exemption does nothing to advance Defendant’s
 11 case.³⁰

12 “Although the combination exemption permits the blending of exempt duties for purposes
 13 of defining an employee’s primary duties, it does not, according to the Secretary, relieve
 14 employers of their burden to independently establish the other requirements of each exemption
 15 whose duties are combined.” *Intracomm, supra*, 492 F.3d at 294. The Fourth Circuit agreed with
 16 the Secretary’s interpretation. *Id.* at 295. As a result, in the instant case, Defendant would have to
 17 prove that Urso 1.) was customarily engaged in sales away from the employer’s places of business
 18 (for the outside sales exemption) 2.) had the primary duty of performing office or non-manual
 19 work directly related to the management or general business operations of the employer or the
 20 employer’s customers, 3.) exercised discretion and independent judgment with respect to matters
 21 of significance, and 4.) satisfied the salary basis test (the administrative exemption).

22 **B. The Combination Exemption Is Not Applicable In This Case Under**
 23 **California Law**

24 Tacking is not available in this case under California law. The only reference that the

25 ³⁰ Plaintiff does not contend that you can never tack the outside sales exemption onto the
 26 administrative exemption in order to satisfy the combination exemption under federal law. On the
 27 contrary, it may be possible, if, as in *Condren v. Sovereign Chemical Co.*, 1998 WL 165148, *4
 28 (6th Cir. 1998) (an unpublished decision), the outside sales are of something other than financial
 products [in *Condren*, the plaintiff sold chemicals]. See also *Intracomm, supra*, 492 F.3d at 288
 [plaintiff sold a software integration system].

1 combination exemption exists in California is a passing one sentence from a 2003 DLSE Opinion
 2 Letter (2003.05.23) (Ex. Y, page 5) which provides zero authority for the assertion and a murky
 3 footnote from *Traylor v. Pyramid Services, Inc.*, 2008 U.S. Dist. Lexis 73494, *11 n.3 (C.D. Cal.,
 4 Sept. 23, 2008) which simply parrots that same one sentence in the 2003 DLSE Opinion Letter in
 5 discussing the tacking of executive and administrative duties. However, Judge Freedman's
 6 decision rejecting tacking of the administrative exemption and outside sales in *Rafiqzada (Duran)*
 7 *v. U.S. Bank National Association* (Alameda Superior Court Case No. 2001 035537) is on point
 8 due to its reasoning.³¹ Specifically, the court stated:

9 "The federal regulation cited in the DLSE opinion letter is 29 C.F.R. §541.600
 10 (a section that has been superceded and re-numbered in the current regulations by
 11 29 C.F.R. §541.708.) Defendant has not offered, and the Court has not found, any
 12 indication in the Wage Orders that the federal tacking regulation has been adopted
 13 into California law. Indeed, the current version of the DLSE Enforcement Manual
 14 contains an appendix showing which federal regulations have been explicitly
 15 incorporated into the Wage Orders and which have not. The Appendix indicates
 16 that the former 29 C.F.R. §541.600 was not incorporated into the Wage Orders and
 17 is not guidance for their enforcement. (See DLSE Manual (2002 Update), Federal
 18 Regulations Appendix at 1, 28 [sections in ~~strikeout~~ are not applicable; section 29
 19 CFR in ~~strikeout~~].)

20 In the absence of any controlling authority indicating that the federal tacking
 21 regulation should be imported, the Court declines to find that the tacking concept
 22 can be applied to exempt status under California law. As the California Supreme
 23 Court has held, statutory provisions regulating wages that are enacted to protect
 24 employees are liberally construed with "an eye to promoting such protection," such
 25 that exemptions to those protections are to be narrowly construed. (*Ramirez v.*
 26 *Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *see also Morillion v. Royal*
 27 *Packing Co.* (2000) 22 Cal.4th 575, 592 [federal authorities are not applicable
 28 absence evidence that they were intended to be incorporated into Wage Orders].)
 Particularly here, where Defendants apparently contend that hours spent on non-
 sales, administrative duties can be added to sales duties (which are per se non-
 exempt under the administrative exemption) to pass the 50% threshold, the tacking
 concept does not apply to Defendant's affirmative defenses." (Pages 5-6, filed
 February 17, 2006)

Perhaps the most compelling reason that tacking of the administrative exemption and
 outside sales is not permissible is that in California, the tacking regulation, 29 C.F.R. §541.600

³¹ A copy of that decision is attached as Exhibit Z. This decision is not, of course, binding
 precedent of any kind, but rather is simply cited for its persuasive reasoning.

(later §541.708), was not adopted in the Wage Orders or 8 C.C.R. §11040. Moreover, 29 C.F.R. §708 allows only the tacking of exemptions and, in California, outside sales and commissioned sales are not exemptions, but rather are exclusions. California Labor Code §1171.³²

Thus, you cannot tack outside sales (not an exemption) onto the administrative exemption to satisfy the combination exemption in California.

VIII. THE CALIFORNIA COMMISSIONED SALES EXEMPTION

Section 3 of Wage Order 4 (8 C.C.R. §11040(3)) relates to hours and days of work. Subsection (A) relates to provisions for overtime but Subsection (D) states: “The provisions of Subsections (A), (B), and (C) above shall not apply to any employee whose earnings exceed one and one half (1 ½) times the minimum wage if more than half of that employee’s compensation represents commissions.” While rather straightforward on its face, this exemption is not easily met. First, as with any exemption, the burden is on the employer to prove clearly and unmistakably that every element is met. Secondly, in our instant case, the sales aspect of this exemption runs afoul of Wells’ persistent claims to both the California and FLSA administrative exemptions. This is so because *Ramirez, supra*, at 804 quoted with approval *Keyes Motors, Inc.*, 197 Cal.App.3d 557: “...First, the employees must be involved principally in selling a product or service, not making the product or rendering the service...” Thus Wells must assert and prove that Urso was involved “principally in selling.”

A. Wells Commissions Were Not Based On The Product’s Price

Labor Code §204.1 defines a commission: “Commission wages are compensation paid to any person for services rendered in the sale of such employer’s property or services and based

³² If an employee spends 40% of time on outside sales and 40% on administrative tasks, s/he qualifies for neither exemption, because s/he cannot reach the quantitative requirement for either outside sales or the administrative exemption. To hold otherwise would permit an employer to claim that an employee engaged in 45% administrative and 6% outside sales to be exempt from the wage, hour and working conditions of Labor Code § 1171, *et seq.*, including minimum wage requirements! As noted by *Ramirez*, such is expressly not the intent of the outside sales exclusion provided for under §1171 and the Wage Orders. While “tacking” of the executive, administrative and professional exemptions may possibly be permitted in certain circumstances, the “narrowly construed” outside sales exclusion cannot be used to “tack” exemptions as it would lead to absurd results.

1 proportionately upon the amount or value thereof.” This language appears to have been suggested
 2 by the lobby for automobile dealers in their successful efforts to modify the requirement that
 3 commissions be paid weekly. The legislative history gives no guidance as to the significance of
 4 “based proportionately upon the amount or value thereof,” but *Keyes* and *Ramirez* interpret it as a
 5 percentage of the price. Specifically, *Ramirez, supra*, at 804 quotes *Keyes* as holding that a further
 6 requirement for the commissioned sales exemption is: “Second, the amount of their compensation
 7 must be a percent of the price of the product or service.” Later in *Harris v. Investor’s Business*
 8 *Daily, Inc.*, (2006) 138 Cal.App.4th 28, 37-38, rev. den. June 28, 2006, the court held that to
 9 qualify the commission had to be a percent of the product’s price and found that a commission
 10 based on “value” and “points” do not qualify. And, in *Wang v. Chinese Daily News*, 435
 11 F.Supp.2d 1042, 1062 (C.D. Cal. 2006), the court observed that calculating commissions for sales
 12 of advertising based on the number or size of ads sold would not qualify. See also *Romero v.*
Producers Dairy Foods, Inc., 235 F.R.D. 474, 487-488 (E.D. Cal. 2006).

13 It is a simple matter for an employer to comply with setting commissions as a percentage
 14 of the price, but Wells has failed to do so. The “product” in question is the mortgage loan. (Ex. C,
 15 Blackwell Depo. 168:13-17; 169:8-22). The price is the amount of the mortgage loan. (*Barnett v.*
 16 *Washington Mutual Bank, FA*, 2004 WL 1753400 *7 (N.D. Cal. 2004)³³. If the *Ramirez* definition
 17 was utilized by Wells, the commission scheme would be easily read and ascertainable by the
 18 worker. Wells Fargo, however, did not utilize an objective formula based upon the price or
 19 amount of the mortgage loan; rather, it used a very complicated, tiered commission “rate” that
 20 varied on loan types and over a dozen variables including managers’ discretion and Wells’
 21 subjective and daily changing estimation of a loan’s profitability based on its projected resale on

22
 23 ³³ In *Barnett*, an issue was whether mortgage loan officers were paid a commission that qualified
 24 under the Labor Code. In different years, the employer based its commissions on different
 25 components of the loan. Judge Breyer directed briefing on those that involved extra compensation
 26 for “overage” or for making certain production goals. However, as to the commission when the
 27 component was simply the amount of the loan, Judge Breyer had no problem finding that it
 28 qualified: “Labor Code Section 204.1, upon which *Keyes* relies, requires the employee to be paid
 ‘based proportionately upon the amount or value’ of the product the employee sold.
 Compensation based on the principle amount of the loan is based upon the value of the product
 sold...”

1 the secondary (wholesale) market.³⁴

2 The 2004 and 2005 Incentive Compensation Plans for HMCs (which are similar but not
3 identical) are attached as Exhibits U and V. The first thing that might be observed is that while a
4 plan which reflects a commission as a simple percentage of the product sold might reasonably be
5 expected to run no more than two pages, the Wells plan actually runs thirteen (13) pages of small
6 type plus two attachments. Relevant portions relating to the factors entering into the computation
7 of the commission rate are marked with an asterisk. As discussed later, the plan is also illegal and
8 void because of wage deductions, which Wells calls “deficits.” These reduce any commission
9 credits and are marked with a “D.” The departures from a simple commission based upon the
10 price of the product are too numerous to list given page constraints. Some of the more egregious
11 departures are that the plan creates varying commission rates that are expressed in basis points
12 (1/100th of 1%) (Bates Nos. WFHM1636; 1532, Section IV(A)).³⁵ Then the “commission rate... is
13 determined by the type of residential mortgage and the monthly funded volume (dollars “\$” or
14 units)...” to create a tiered rate. (Bates Nos. WFHM1636; 1532, Section IV(B)).³⁶ Multiplying
15 the proper tier after including or excluding the various loan types specified then results in a
16 commission “credit” which is “subject to adjustment for Overage and Underage... If the amount
17 of discount and origination fee paid at funding is over or under the discount and origination fee
18 authorized by the Secondary Marketing Department [of Wells] at the time the final price on the
19 loan is locked in.” (middle of Bates Nos. WFHM1637; 1533).³⁷

20 ³⁴ For example, Todd Hauer, who was Wells’ 30(b)(6) deponent on Urso’s commissions, testified
21 that loan profitability was communicated daily, and sometimes more frequently, to HMCs by
22 “price blast sheets.” (Ex. B, Hauer Depo. 71:10-75:9).

23 ³⁵ Wells has redacted the actual basis points and numerous dollar figures from the produced copies
24 of its plans claiming that these five year old plans still contain corporate trade secrets.

25 ³⁶ As seen Bates Nos. WFHM1637 and 1534, the basis points vary based upon an ascending tier
26 which factors in variously the number of loans (units) and dollar volume. What also enters into
27 the tiers is whether the loan is one for purchase or refinance. Other loans may or may not be
28 included, such as construction loans, referrals to program specialists, home equity loans, and
SmartPay lines of credit.

³⁷ The plan then notes “employer reserves the right to reduce the commission rates on refi loans at
any time on a prospective basis.” The plan then goes on to introduce further variables with respect
(footnote continued)

1 The rate of commission also varied based upon any overage or underage on the loan.
 2 Overage is defined under the plan as “the amount of discount and origination fee paid at funding
 3 over the discount and origination fee authorized by [Wells’] Secondary Marketing Department at
 4 the time the final price on the loan is locked in.” The amount of commission rate change for
 5 overage is also tiered as shown by the chart on Bates Nos. WFHM1642 and 1538 at (C)(1). The
 6 HMC must document the overage and receive approval from the Regional Sales Manager. To
 7 receive commission credit, the employee “must collect a return to float fee from the borrower of
 8 1% of the loan amount.” Underage is defined as “any deficit resulting from the difference
 9 between the company authorized discount and origination fee and the discount and origination fee
 10 actually created... Employee’s commission credit may be reduced up to 100% of underage as
 11 determined by the Branch Sales Manager and Regional Sales Manager in accordance with Loan
 12 Economics thresholds and standards... If employee’s Loan Economics performance does not meet
 13 the threshold level, then employee’s commission credit may be reduced by a percentage of the
 14 underage.” (WFHM1642; 1538, C(2)). No explanation of “Loan Economics performance” is
 15 given. “Threshold levels” are not explained. Hauer, Wells’ 30(b)(6) deponent, testified that while
 16 projected profitability was set by Wells in terms of par, overage and underage (see fn 34), HMC
 17 branch managers also set their own thresholds of loan profitability. Different types of loans could
 18 also have different thresholds set. (Ex. B, Hauer Depo. 101:7-103:18).

18 \\\

19 _____
 20 to refinances within six months, brokered loans, employee loans, home equity loans connected
 21 with refis, Assistant/Associate underage sharing, national subsidies, and Prefer to Refer loans.
 22 (bottom of Bates Nos. WFHM1637; 1533-1534). Different basis points are involved if there is a
 23 government loan (FHA/VA), a subprime loan, a special housing bond loan, a loan where Wells
 24 does not receive the servicing on the loan, an equity loan, a line of credit, an employee loan, a
 25 portfolio loan, a Premiere Asset referred loan, an assumption or bridge loan, and a loan referred by
 26 other Wells employees or bankers. (¶¶9-13, 15-17, 19 (Bates Nos. WFHM1639-1641; 1536-
 27 1538)). Paragraph 14 of the plan, which appears at Bates Nos. WFHM1641 and 1537, deals with
 28 builder loans. It provides that the commission rate for builder loans derived from an account
 established solely by the HMC shall be in accordance with the standard commission schedule “as
 set forth above,” but that the rate may be reduced if the account was “derived” from a relationship
 with a Regional Builder Sales Manager, a Regional Builder, National Markets Builder, or New
 Construction Sales Manager.

1 The actual commission "credit" could also be reduced if a pricing subsidy established by
 2 Wells was used in connection with the loan. The partial or full reduction of the commission credit
 3 is made on a loan-by-loan basis "as communicated by management." (WFHM1644; 1540, ¶H).
 4 All of the general provisions of the plan are then subject to individualization for each individual
 5 HMC as indicated in Attachment A to the plan and Attachment B (the Commission Rate
 6 Adjustment Schedule). Wells has informed Plaintiff's Counsel that no completed Attachments A
 7 and B (which require the signatures of two levels of managers) can be located with respect to
 8 Urso. While the Wells plan is confusing, the one thing that is very clear is that the commission is
 9 not based on the price of the product.

10 **B. Illegal Deductions Void The Commission Plans And Disqualify The Commissions**

11 Wells' commission plans are also fatally flawed because it allowed for, and Urso actually
 12 suffered, deductions from wages. These deductions not only render Wells' commissions
 13 unqualified because they were not based simply on a percentage of the product's price, these
 14 deductions were illegal and in clear contravention of long standing California law, Wage Orders,
 15 and case law. Because these illegal deductions were key elements of Wells' overall commission
 16 plan, these deductions voided that plan and vitiated any right by Wells to claim that monies paid to
 17 Urso represented qualified commissions. In *Kerr's Catering Service v. Department of Industrial*
 18 *Relations*, (1962) 57 Cal.2d 319, 329, the California Supreme Court held that an employer's
 19 deductions from a saleswoman's commission for cash shortages was illegal. The employer argued
 20 that prohibiting deductions for such shortages placed the burden of loss on the employer. The
 21 Supreme Court responded "...some cash shortages, breakage and loss of equipment are inevitable
 22 in almost any business operation. It does not seem unjust to require the employer to bear such
 23 losses as expenses of management..." Noting that deductions violated the employee bond law
 24 provisions of the Labor Code (§§400-410), the Supreme Court stated that this voided the contract:
 25 "The imposition by statute of a penalty implies a prohibition of the act referred to and a contract
 26 founded upon such act is void." [citations omitted] (*Id.* at p. 328).

27 Seventeen years later, the case of *Quillian v. Lion Oil Company*, (1979) 96 Cal.App.3d
 28 156, 162-163 involved a manager of two service stations whose wages consisted of a base salary
 plus an incentive bonus based upon sales less shortages. The court found this payment plan to be

1 a subterfuge and illegal: "Rather than call this incentive payment a commission and then deduct
2 for shortages in contravention to *Kerr*, appellant deducts shortages from the payment and calls the
3 final result a bonus. Appellant then self-righteously proclaims that no deductions were made from
4 the bonus. Unfortunately, the result is the same. The manager carries the burden of losses from
5 the station." The holding of these cases was followed in *Hudgins v. Neiman Marcus Group, Inc.*,
6 (1995) 34 Cal.App.4th 1109, 1123-24. In that case, the salesperson's commissions were reduced
7 by a proportion of merchandise returned by customers where the salesperson could not be
8 specifically identified. In finding that an employer may not reduce wages for costs arising from
9 other than the intentional misconduct or gross negligence of the employee, the court found "At
10 bottom, the Neiman Marcus deduction offends the Labor Code in precisely the same way the
11 bonus plan in *Quillian* did." After noting that Neiman Marcus had many options to curb the
12 impact of such unidentifiable returns, the court observed "the one tool that is *not* available to
13 Neiman Marcus, however, is an employment agreement by which Neiman Marcus requires its
14 employees to consent to unlawful deductions from their wages. (citations omitted)" Finally, in
15 *Prachasaisoradej v. Ralph's Grocery Company, Inc.*, (2007) 42 Cal.4th 217, 235-42, the Supreme
16 Court reviewed these earlier cases and distinguished them from a profit sharing plan. The court
17 noted, "In each of those cases, the employee's compensation, whether regular or supplementary,
18 was set, in essence, as a sales commission, i.e., as specified in promised share of the revenues
19 attributable to that employee's personal sales or managerial efforts. The set commission was then
20 directly reduced by the full dollar value of the merchandise and cash losses, as determined by the
21 employer, and regardless of employee fault... By this means, the employer reduced individual
22 employee's wages to increase its own retained profits. This is the practice the statutes,
23 regulations, and cases have prohibited." *Id.* at p. 236. In summary, the court found referencing the
24 Labor Code "...Sections 221 through 224, in combination with other statutes, establish a public
25 policy against *any* deductions, setoffs, or recoupments by an employer from employee wages or
26 earnings, except those deductions specifically authorized by statute. (citations omitted)" *Id.* at p.
27 241.
28

Wells' Compensation Plans included provisions that created varied deductions and none required any finding of intentional misconduct or culpable negligence on Urso's part.³⁸ These deductions, called "deficits," included any fees uncollected from borrowers, "failure to meet loan compliance and quality requirements, price protection, registration and documentation requirements, or other performance requirements... Deficits may be subtracted from commission credit one hundred percent..." (WFHM1636, Section IV(A)).³⁹ Other deductions could be taken by Wells to supplement the income of a mortgage assistant (WFHM1641; 1538, ¶18), underage (WFHM1642; 1538, ¶C(2)), loan files incomplete or not compliant with the HMC Compliance Assessment Job Aid (WFHM1644, ¶I), and "excessive loan fallout penalties" (WFHM1644, V(C)). In clear contravention of California law as articulated in *Barnhill v. Robert Saunders & Co.*, (1981) 125 Cal.App.3d 1, 6-7, Wells also provided that these deductions were subject 100% to setoff from the HMC's final wages. (WFHM1644, Section V(C)).

A review of Urso's commission statements (Ex. T) and the deposition of Todd Hauer, Wells' 30(b)(6) deponent on her commissions, establishes she did actually suffer such deductions. For example, she had wages reduced for the assistance of a mortgage associate (Ex. B, Hauer Depo. 99:17-24), for fees not collected (Hauer Depo. 109:17-24; 110:10-111:2), and for underage (Hauer Depo. 112:15-113:3).

C. Wells Cannot Meet Other Requirements

Finally, Urso asserts that Wells cannot affirmatively prove that it met several other critical requirements of the commissioned sales exemption. For example, without the detailed time records mandated by 8 C.C.R. §11040(7)(A)(3) and (5) and with no real evidence of her work schedule, it cannot prove that, in any given time period, Urso received one and one half times the minimum wage. *Harris v. Investors, supra*, at 39. Nor can Wells prove that in some months more than half her compensation even came from commissions, let alone commissions that comported

³⁸ The applicable Wage Order forbids any employer to make any deduction from wages for losses "unless it can be shown that the shortage, breakage or loss is caused by a dishonest or willful act, or by the gross negligence of the employee." (8 C.C.R. §11040(8)).

³⁹ Fees included were for appraisals, credit reports, lock, commitment, Builder Best, return to float, and other application fees. (WFHM1643 ¶G; 1540 ¶F).

1 with California law. Nor were commissions paid on a regularly scheduled day. Wells simply
2 failed to observe the straightforward requirements for California commissioned sales.

3
4 Dated: September 20, 2010

Respectfully submitted,

5 MCINERNEY & JONES

6 /s/ Kelly McInerney

7 Kelly McInerney
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PROOF OF SERVICE

In re Wells Fargo Home Mortgage Overtime Litigation

Caroline Urso v. Wells Fargo Home Mortgage

United States District Court, Northern District of California

Case No. 3:06-md-1770 MHP

I, the undersigned, declare as follows:

I am employed in the County of Washoe, State of Nevada.

I am over the age of eighteen (18) years and not a party to the within action; my business address is 18124 Wedge Parkway, #503, Reno Nevada, 89511.

On September 20, 2010, I served the foregoing document(s) described as:

1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT ON WELLS' EXEMPTION CLAIMS UNDER THE: 1) FEDERAL AND CALIFORNIA OUTSIDE SALES EXEMPTIONS; 2) FEDERAL AND CALIFORNIA ADMINISTRATIVE EXEMPTIONS; AND 3) CALIFORNIA COMMISSIONED SALES EXEMPTION
2. DECLARATION OF KELLY McINERNEY IN SUPPORT OF PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT ON WELLS' EXEMPTION CLAIMS UNDER THE: 1) FEDERAL AND CALIFORNIA OUTSIDE SALES EXEMPTIONS; 2) FEDERAL AND CALIFORNIA ADMINISTRATIVE EXEMPTIONS; AND 3) CALIFORNIA COMMISSIONED SALES EXEMPTION
3. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON WELLS' EXEMPTION CLAIMS UNDER THE: 1) FEDERAL AND CALIFORNIA OUTSIDE SALES EXEMPTIONS; 2) FEDERAL AND CALIFORNIA ADMINISTRATIVE EXEMPTIONS; AND 3) CALIFORNIA COMMISSIONED SALES EXEMPTION

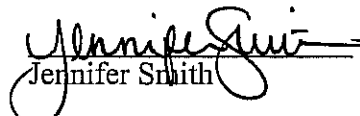
on all interested parties in this action addressed to the addressee as follows:

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XX By CM/ECF. I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the above CM/ECF registrant(s).

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on September 20, 2010 at Reno, Nevada.


Jennifer Smith

PROOF OF SERVICE